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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 328

UNITED STATES OF AMERICA,

Appellant,

v.

ROCCO TATEO.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

BRIEF FOR THE APPELLEE TATEO

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Constitutional Provision Involved

The pertinent portion of the Fifth Amendment provides as follows:

No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *

Statement

On May 15, 1956, Tateo and another were brought to trial before a jury on a five-count indictment charging bank robbery (18 U.S.C. 2113); kidnapping in connection with the robbery (18 U.S.C. 2113(e)); taking and carrying away bank money (18 U.S.C. 2113(b)); receiving and possessing

stolen bank money (18 U.S.C. 2113(e)); and conspiracy (18 U.S.C. 371).

On Friday, after four days of trial, the Judge told the defendants through counsel what he was to later confirm on sentence:

"... I want you to know that I was very serious and earnest when I said that if you had been convicted by the jury I intended to give you the absolute maximum sentence, a life sentence plus all of these years to follow the life sentence.

If anybody wonders how one can serve a sentence after he has served a life sentence, it is very simple, because in a life sentence you are eligible for parole in fifteen years; but with a sentence to follow a life sentence, you are not eligible for parole on the life sentence, and you have to stay in jail for the rest of your life." (R. 23)

Under the impact of the Judge's attitude Tateo entered a plea of guilty on the following Monday and the next day the co-defendant changed his plea and the jury was discharged. Tateo was sentenced to imprisonment for 22 years and 6 months and the prosecution consented to the dismissal of the kidnapping count on Tateo's motion.

On February 8, 1963, Judge Weinfeld granted Tateo's motion under 28 U.S.C. 2255 to vacate the conviction, finding that:

"The realities of human nature and common experience compel the conclusion that the defendant was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea of guilty." (R. 56-57)

and:

"No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty—that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term." (R. 55)

Tateo was reindicted for the kidnapping offense and brought before Judge Tyler for retrial of this charge and the four bank robbery charges to which he had previously pleaded guilty. Prior to the second trial, Judge Tyler sustained defense motions to dismiss both the new kidnapping indictment and the four bank robbery counts of the original indictment and ordered Tateo discharged from prison, just one month short of seven years after the original sentence. As to all counts, Judge Tyler held that:

"Since neither constitutionally sound consent nor an 'exceptional circumstance' underpinned the termination here, a second trial is constitutionally impermissible." (R. 131)

The Government has abandoned the capital kidnapping count and has appealed to this Court only from that part of the judgment which barred the retrial on the other four counts.

Summary of the Argument

1. Tateo's trial was improperly terminated because of the coercive actions of the trial judge which led to his plea of guilty and the discharge of the jury.

Under long established and well understood rules, once a defendant's criminal trial commences it may be terminated short of verdict only by reason of some "imperious necessity" or at the defendant's request. In certain circumstances it may be terminated by the trial judge acting solely in the defendant's interests.

There is no rational way in which a trial judge's fixed intention to impose a life sentence and a consecutive term of years can be construed as an imperious necessity to terminate the trial, or a consent by the defendant to its termination, or an action taken by the court solely in the interests of the defendant.

This Court's decision in *Downum v. United States*, 372 U.S. 734 makes plain that any impermissible termination short of verdict bars a retrial. Perforce, the improper termination of Tateo's trial after four days of the Government's case bars his retrial after seven years of imprisonment.

2. Nothing in the customary rule of retrial after appellate reversal demands, much less allows, that Tateo be required to abandon the Fifth Amendment's protection against double jeopardy in regard to the discharge of the trial jury in order to seek relief from a plea and sentence, which were the result of coercion.

This Court in *Green v. United States*, 355 U.S. 184, has specifically rejected the notion, once again advanced by the Government, that the rule permitting retrials after reversal

as enunciated in *United States v. Ball*, 163 U.S. 662, operates to deprive a defendant of the constitutional right to be protected against a second jeopardy when he seeks relief from a different judicial error. The customary application of the *Ball* rule is unimpaired by the decision of the District Court in this case, and no considerations of "policy" advanced by the Government to show the merits of the rule justify abrogating an express provision of the Constitution of the United States.

ARGUMENT

I.

Tateo's First Trial Was Terminated by the Coercive Action of the Trial Judge and Therefore He Cannot Be Tried Again.

Once a jury is assembled and a criminal trial commences it may be properly terminated short of the jury's verdict only under clearly defined circumstances. Improper termination bars retrial and the termination here was improper.

The first group of circumstances which justify the termination of a criminal jury trial short of verdict are those of "imperious necessity" which obstruct the completion of the trial, as, for example, the inability of the jury to agree (*United States v. Perez*, 9 Wheat. 579), or battlefield conditions (*Wade v. Hunter*, 336 U.S. 684). There is no quarrel with this principle but it has no application to the issues before the Court in this case.

The second group of circumstances which justify a termination short of verdict are those in which a defendant voluntarily asks for or knowingly consents to the termination of the trial, presumably because it is to his advantage to do so. In *Gori v. United States*, 367 U.S. 364 this Court

extended the rule permitting retrial where the defendant moves for a mistrial to those cases in which the trial judge declares a mistrial to protect the rights of the defendant.

"Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." *Id.* 369

The Court deferred the question which is now presented for decision:

"Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment— . . ." *Id.* 369

Mr. Justice Story, writing in *United States v. Perez*, 9 Wheat. 579, for a unanimous Supreme Court, set out the standards by which Federal Courts should be guided in the granting of mistrials. That standard has been the consistent guide for the exercise of judicial discretion in the discharge of criminal juries short of verdict and was quoted with approval in *Gori, supra*, and relied upon by Judge Tyler in deciding this case.

" . . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain

and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. * * *

9 Wheat., at page 580. *Gori v. United States*, 367 U.S. 364, 368-369

It is hard to see how the Government can argue that there were plain and urgent circumstances, or that the Court was being extremely careful as to how it interfered with any chances of the defendant. Just the opposite was true. Judge Weinfeld found that:

"The choice open to this defendant when apprised during the trial of the Court's statement was rather severely limited. If, as was his constitutional right, he continued with the trial and were found guilty, he faced, in the light of the Court's announced attitude, the imposition of a life sentence upon the kidnapping charge, plus additional time upon the other counts, a sentence which his lawyer informed him and which he believed, not without reason, meant life imprisonment." (R. 53)

and Judge Tyler found that Tateo:

"... was coerced from availing himself of his Fifth Amendment right to go to the original jury for its verdict of guilt or innocence." (R. 132)

This case presents no question of a defendant asking for or consenting to a termination of his trial short of verdict, nor of a trial judge declaring a mistrial because of a tender regard for the rights of the defendant. If Tateo had chosen

to plead guilty and elected to terminate the trial, there would be no question of double jeopardy. However, both the plea and the termination of the trial were the coerced result of the Trial Judge's conduct, and therefore Tateo may not once again be placed in jeopardy of life and limb.

The Government contends that the fact that the trial was improperly terminated is not controlling, as there are many cases retried after reversal where errors during the trial deprive the defendant of a meaningful right to get to the jury, such as errors in instruction, prejudicial comments by the prosecutor, or coercive interference with jury deliberations. (Appellant's Brief, 20-22)

The answer to this is that an appeal taken after a jury verdict gives the defendant an additional measure of protection. Not only does he have the right to have the jury decide his case, but he also is guaranteed by appellate review the right to have the jury decide his case free from the influence of error. Tateo was deprived of the right to have a jury consider his case at all.

The realities of jury trials demonstrate that the Government sells the right of jury trial too cheap by equating it with the right to have an error-free case submitted to the jury. Surely it is not unfair to assume that at least some of the juries which acquit defendants do so after trials in which reversible error has been committed. Tactically, as every trial lawyer knows, there are many instances in which a defendant will forego a motion for a mistrial in favor of the right of having his case decided by the jury.

When Tateo was coerced out of his right to have the jury which began his case sit and decide it, he was done a fundamental and irreparable injury.

The Government also contends that Tateo had a variety of alternatives and that he exercised a "meaningful choice"

among them. (Appellant's Brief, 24) He could, the Government suggests, have proceeded to verdict and appealed the sentence. But it would be an audacious trial lawyer indeed who would advise a client in a Federal Court to risk a life in prison without hope of parole on the basis of an appellate review of his sentence, for there is no power to review a sentence within the statutory maximum either in the Supreme Court (*Gore v. United States*, 357 U.S. 386, 393) or in the Court of Appeals (*Pependrea v. United States*, 275 F.2d 325, 329 (C.A. 9)).¹

The Government suggests that Tateo could have moved for a mistrial and that had it been granted he would have been subjected to retrial. (Appellant's Brief, 22) However, when one remembers that it was the Judge's fixed purpose to impose a Draconian sentence which was at the base of the termination and the judgment here, it seems plain that it is unrealistic to expect the defendant to have braved the anger of the Judge who would sentence him in the event of conviction by attacking the Judge's attitude on the question of sentence on the motion for a mistrial.

The measure of the value which this Court has placed upon the defendant's right to complete his trial before the jury which commences to hear it may be gaged by the decision in *Downum v. United States*, 372 U.S. 734, upon which Judge Tyler relied so heavily in barring retrial. In *Downum* the jury was impanelled and discharged when it was discovered that a Government witness was unavailable.

¹ In *Beckett v. United States*, 84 F.2d 731, 733, two middle-aged Negro physicians were sentenced to 25 and 21 years, respectively, for a mail fraud involving about two thousand dollars; the Court noted that there was, "fortunately," relief from judicial harshness, but that it was in the pardoning power of the executive, hardly the sort of precedent to comfort a man charged with bank robbery and on trial before a judge minded to impose maximum penalties.

A second trial was commenced two days later which this Court held was barred by the protection against double jeopardy.²

"Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori v. United States*, *supra*, 369. But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in *United States v. Coolidge*, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' *United States v. Ball*, 163 U.S. 662, 669." *Id.* 736

Scholastic ingenuity can conjure up a number of contingencies which would have left Tateo in a different position than the one in which he now stands,³ but the reality of the case is that Tateo was coercively deprived, after four

² The Supreme Court of Washington reached a similar result in *State v. Connors*, 59 Wash. 2d 879, 882; 371 P. 2d 541, 544, where the jury was improperly separated after being impanelled without hearing evidence and the trial court declared a mistrial on its own motion and a second trial was commenced the same afternoon. Considering " . . . the problem from the standpoint of the right of a defendant to have his case determined by the jury which he has accepted and which has been impanelled and sworn to try his case . . ." it held that where " . . . a jury has been impanelled and sworn to try the case, the defendant has the right to have his case determined by that jury . . ." and voided the verdict of the second trial.

³ It is equally true that had the Government in *Downum*, *supra*, asked for a two-day adjournment instead of impanelling a jury, the result, in all probability, would have been very different.

days of trial jeopardy, of his right to have the jury decide his case and was additionally coerced into pleading guilty and serving seven years in prison. The Government now seeks to place him in jeopardy for the same crimes a second time.

The United States Attorney's conduct at the first trial contributed no prejudicial element which induced the improper termination of that trial, and accordingly, the Government understandably is vexed that it cannot try the defendant again,⁴ but the double jeopardy protection of the Fifth Amendment is no mere procedural device to regulate Government conduct and thus secure a substantive right, as is the procedural rule forbidding the use in court of illegally seized evidence which enforces the right of the people to be secure from unreasonable searches and seizures. The protection against double jeopardy is a fundamental ingredient of our freedoms.

II.

Under the Rule in *Green v. United States*, 355 U.S. 184, the Defendant Tateo Is Not Required to Barter Away His Protection Against Double Jeopardy Arising From the Improper Discharge of the Trial Jury in Order to Attack the Coerced Plea of Guilty.

Two separate legal wrongs were done to the defendant Tateo. First, he was coerced into pleading guilty and sentenced to 22 years and 6 months in prison as a result of that plea. Second, he was deprived of his right to have

⁴ But it is the violation of the defendant's right to be free from successive jeopardies and not the conduct of the Government which is controlling. Thus, in *Fong Foo v. United States*, 369 U.S. 141, this Court barred retrial when the Government was not only free from misconduct but had not even had a fair opportunity to put in its evidence.

the jury impanelled to hear his case, consider it and render a verdict. The first wrong was redressed when Judge Weinfeld set aside the plea and judgment. The second wrong was redressed when Judge Tyler held that Tateo could not be tried again.

Put in another way, Tateo had two valid pleas which prevented his retrial. One was in the nature of *autrefois convict* and the other was a plea of former jeopardy. When, by his own action, he set aside the conviction, he relinquished the plea of *autrefois convict*, but no rule of law, logic or policy permits, much less requires, that he additionally forego his objection to retrial on the ground of his former jeopardy.

The Government takes the position that the judgment here having been set aside at the instance of the defendant, he may be retried under the rule of *United States v. Ball*, 163 U.S. 662, and urges that the rationale of the *Ball* decision and the policy considerations underpinning it make it applicable to this case.

There is no doubt that at this point in history, the *Ball* rule is firmly engrafted on to the plain meaning of the Constitution, and despite the words "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; . . ." in the Fifth Amendment, the rule of retrial for the same offense after reversal is the current law. The *Ball* rule does no more than put the defendant in *status quo ante*. After a trial infected with error is reversed the defendant is given a new and fair trial. After an improper pretrial of guilty which is set aside, the defendant confronts anew the choice of whether or not to plead guilty. Reduced to its essentials the *Ball* rule simply deprives a defendant of the protection

against double jeopardy in a measure coequal to the scope of his attack, but it does not impose a penalty on a defendant by requiring him to surrender constitutional rights such as the protection against double jeopardy in order to exercise a statutory right such as appeal or collateral attack under 28 U.S.C. 2255.

It is not true that any legal attack on a prior proceeding will lay the defendant open to retrial on every part of the prior charges. In *Green v. United States*, 355 U.S. 184, this Court held that a defendant tried and convicted of a lesser offense (murder in the second degree) could not on retrial after reversal be convicted of the principal offense (murder in the first degree) originally charged. That rule applies with full force to this case. In order to vindicate his right to be relieved of the judgment rendered on the coerced plea of guilty Tateo should not be required to give up the protection of the constitutional safeguard against double jeopardy.

The *Ball* rule has sometimes been justified as resting upon a theory of waiver and sometimes, though never by a majority of the Court, as resting on the theory that by bringing further proceedings the defendant continues the original jeopardy. In *Green v. United States, supra*, the Court cast grave doubt on, if it did not indeed reject outright, the theory of waiver, and quoted with approval, as did Judge Tyler, the view expressed by Mr. Justice Holmes, dissenting in *Kepner v. United States*, 195 U.S. 100 at 135:

"Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to

be saved by an express clause in the Constitution of the United States.' " *Green, supra* at 207.

If any waiver is to be found here it will have to be of the legal fiction kind, for the defendant's motion was to vacate the judgment and be discharged from custody (R. 36), and the Government's brief to the contrary notwithstanding (Appellant's Brief, 2), the most that can be made of the formalistic language of the moving papers is a request by Tateo that he be discharged from custody or in the alternative that he be re-arraigned to plead *de novo* to the indictment. (R. 39) This latter course was substantially what occurred and the defendant effectively entered a plea in bar to the grounds of former jeopardy.

The issue before the Court is whether it will now extend the *Ball* rule, as it refused to do in *Green, supra*, and require the defendant Tateo to surrender his protection against double jeopardy in order to be free of a sentence imposed by coercion. To hold, as Judge Tyler did, that he does not give up the one right in seeking to secure the other, does not impair the usual and customary application of the *Ball* rule.⁷

⁶ A similar view that both the waiver and continuing jeopardy explanations for retrial after reversal are tautological statements of a result rather than analytic explanations is to be found in Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 6-7.

⁷ See 18 U.S.C. 3731 and *United States v. Ball*, 163 U.S. 662, 665; *Ex Parte Nielson*, 131 U.S. 176, 177; all to the effect that the double jeopardy defense is by way of a plea in bar.

⁸ As this case does not involve an attack on the *Ball* rule, we do not think it appropriate to treat extensively that question, shrouded in historical obscurity, of whether the rule comports with the original understanding of the framers of the Constitution, except to note that Mr. Justice Story, who was far closer in historical time than we are, thought that it did not, and in *United States v. Gibert*,

None of the policy reasons advanced on behalf of the *Ball* rule warrant its extension to this case. The Government asserts that to bar a retrial of Tateo would be to grant an immunity from punishment "simply" because of "trial error". (Appellant's Brief, 13)

Tateo, after seven years in prison under a coerced plea of guilty, can hardly be said to be receiving an immunity bath. The Government in a footnote (Appellant's Brief, 25, footnote 13) presumes that if Tateo were convicted again, the sentencing judge would take the time Tateo has already served into account when imposing sentence. This solicitude is new-found, for the prosecutor in the Court below was apparently ready to ask the death penalty at the retrial even though the Government had not done so at the first trial (R. 71-73), and announced his intention of using the minutes of the collateral proceedings to prove an "admission" made by the defendant to Judge Weinfeld (R. 124). If Judge Tyler had not barred retrial, Tateo, after seven years in prison, would have run the risk on retrial of having the testimony he gave in his collateral attack on the coerced plea of guilty used against him, and might have waited in the shadow of the electric chair until this Court decided whether the rule of *Green, supra*, applied to his case. Beyond any advantage which might accrue to the Government on retrial, there is an enormous and obvious prejudice to a defendant who has suffered long years of imprisonment under an unjust conviction in being required to undergo for a second time the ordeal of trial.

25 Fed. Cas. 1287 (No. 15294) (1834), in a closely reasoned opinion resting upon the English precedents and the Seventh Amendment provision that no jury finding in a civil suit could be re-examined except under common law rules came to that conclusion. See also *Green, supra*, at 189 (opinion of the Court) and at 201-204 (dissenting opinion).

Almost every search involving contraband which is found to be illegal means a practical grant of immunity and this is true not because of "trial error" on the part of judges and lawyers, but because of wrong conduct on the part of police officers.

A solicitude for the basic preconditions of a free society and not a tenderness towards criminals makes our courts daily suppress evidence seized in violation of the Fourth Amendment (*Weeks v. United States*, 232 U.S. 383) and impelled this Court to make the protection of the Fourth Amendment binding against the states (*Mapp v. Ohio*, 367 U.S. 643; *Ker v. California*, 374 U.S. 23, 33).

By its very nature, the protection against double jeopardy always will be invoked by a defendant who, after conviction, acquittal or mistrial, seeks to bar a further trial that some prosecutor feels advances the cause of law and order. The protection against double jeopardy, like the other rights saved by express clauses of the Constitution of the United States, is a protection of the citizens of this country to which prosecutorial zeal must yield.

The second policy reason the Government advances for extending the *Ball* rule to cover this case is that where retrial is permitted, reviewing courts are freer in recognizing error and reversing convictions, uninfluenced by circumstances of guilt or innocence; but even under the traditional retrial rule, appellate courts are not wholly uninfluenced by such considerations.*

* Rule 52 of the Federal Rules of Criminal Procedure, the harmless error rule, is regularly applied by courts with a view to the strength of proof of guilt. See *Garner v. United States*, 277 F.2d 242, 245 (C.A. 8) (error which might call for reversal in a close case disregarded because of the strong evidence of guilt); *Apt. v. United States*, 13 F.2d 126, 127 (C.A. 8) (a "righteous" verdict sustained in spite of an indefensible cross-examination); *Amendola v. United States*, 17 F.2d 529, 530 (C.A. 2) (reversal on error which might otherwise be held harmless because of severity of sentence).

The Government's view that retrial after reversal leads to more adequate appellate consideration of defendants' rights and thereby confers a benefit upon defendants, takes a bizarre turn when it is advanced as a reason for abrogating an express provision of the Constitution. Every plea of double jeopardy when sustained necessarily involves barring retrial. This Court in *Downum*, *supra*, barred a retrial where the defendant had been properly convicted after a constitutionally impermissible second trial.

It is equally true that in a broad and active area of constitutional protections, that of the Fourth Amendment protection against unreasonable searches and seizures, reviewing courts know that in a great many cases the suppression of illegally seized evidence, as a practical matter, stops prosecution, and yet this Court, in the landmark decision of *Mapp v. Ohio*, 367 U.S. 643, extended to the States the Federal rule (*Weeks v. United States*, 232 U.S. 383) forbidding the use in evidence of the fruits of unconstitutional searches and seizures. The fact that retrial is frequently impossible after the suppression of illegally seized evidence did not outweigh the importance of vindicating a fundamental right expressly set out in the Constitution of the United States. To argue, as the Government does, that the constitutional protection against double jeopardy should be constricted in order to facilitate appellate review is to turn justice upside down.

Tateo's first trial jury was discharged as a result of the Trial Court's coercive conduct which led to his plea of guilty.

It is unfair that after seven years in prison the defendant Tateo should be asked to run the gauntlet a second time. We ask that the Court once again, as it did in *Downum v. United States*, *supra* at 738, "... resolve any doubt 'in

favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.'"

Conclusion

For the reasons stated, we respectfully submit that this Court should affirm the judgment of the District Court which barred the defendant's being twice placed in jeopardy.

Respectfully submitted,

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March, 1964